Mohamad Zubir bin Mustafa v Public Prosecutor

HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO 42–27 OF 2006
ZAMANI A RAHIM JC
30 SEPTEMBER 2009

Civil Procedure — Appeal — Record of appeal — No written grounds of decision because trial judge interdicted from performing her duty — Whether the High Court hearing appeal could exercise revisionary power — Whether non-delivery of grounds of decision impeded task of appellate court — Criminal Procedure Code ss 307, 308 & 325

The appellant, a pensioner, was charged with an offence under s 165 of the Penal Code (a prescribed offence under s 2 of the Anti-Corruption Act 1997). The prosecution adduced evidence that the appellant, while he was the 'Ketua Sektor Pengurusan dan Perkhidmatan' of Kedah had requested one Mohamad Suhaimi bin Othman ('Suhaimi') with whom he had official relations to pay for his daughter's wedding expenses. It was also alleged that in return for this the appellant had awarded a contract to Suhaimi. At the close of the prosecution's case the sessions court judge hearing the case was satisfied that the essential ingredients of the offence had been established and the presumption under s 42(3) was raised against the appellant. The appellant denied having awarded the contract to Suhaimi or having requested the latter to pay for the said wedding expenses. The sessions court judge who held that the prosecution had successfully proved its case, convicted and sentenced the appellant to six months' imprisonment and a fine of RM5,000. The appellant appealed against the conviction and sentence pursuant to s 307 of the Criminal Procedure Code ('CPC') and an application for stay of execution of the sentence was granted pending appeal. Pursuant to s 308 of the CPC, the Sessions Court, Alor Star as the court appealed from, had to transmit to the High Court the record of appeal which consisted of a copy each of the record of proceedings, the grounds of decision, the notice of appeal and the petition of appeal. However, there was no written judgment in this case because the sessions court judge who heard and delivered the decision in this case was interdicted from performing her duty in accordance with reg 44 of the Public Officers (Conduct and Discipline) Regulations 1993. Thereafter, as directed by the Chief Justice of Malaya (CJM), the record of appeal was compiled without the grounds of decision. In his appeal, the appellant submitted that the conviction and sentence ought to be set aside by this court in the exercise

of its revisionary powers. The prosecution, on the other hand submitted that the conviction and sentence imposed should not be disturbed.

Held, dismissing the appeal:

(1) The absence of grounds of judgment in the instant case meant that there was no proper appeal. The High Court could thus proceed to exercise its power of revision in dealing with this appeal (see para 16).

(2) According to the appeal record, the trial judge had obviously evaluated and considered both the evidence tendered by the prosecution and the defence, and ruled that the defence had failed to cast any reasonable doubt on the prosecution's case and also failed to rebut on the balance of probability the presumption under s 42(3). Since there was no error made by the sessions court judge both in law and in facts, the non-delivery of grounds of judgment in this case did not impede task of this court in evaluating and examining the decision of the sessions court judge. Thus the decision of the sessions court judge was affirmed by this court in the exercise of its revisionary powers under s 325 of the CPC (see paras 21 & 23).

[Bahasa Malaysia summary

Perayu, seorang pesara, dituduh dengan satu kesalahan di bawah s 165 Kanun Keseksaan (satu kesalahan yang ditetapkan di bawah s 2 Akta Pencegahan Rasuah 1997). Pihak pendakwaan mengemukakan keterangan bahawa perayu, semasa bertugas sebagai Ketua Sektor Pengurusan dan Perkhidmatan Kedah telah meminta seorang yang bernama Mohamad Suhaimi bin Othman ('Suhaimi') yang dengannya dia mempunyai urusan rasmi untuk membayar perbelanjaan perkahwinan anak perempuannya. Ia juga dikatakan bahawa sebagai balasan perayu telah memberikan suatu kontrak untuk Suhaimi. Di akhir kes pihak pendakwaan, hakim mahkamah sesyen yang membicarakan kes tersebut berpuas hati bahawa faktor-faktor penting kesalahan tersebut telah dibuktikan dan anggapan di bawah s 42(3) telah dibangkitkan terhadap perayu. Perayu menafikan memberikan kontrak kepada Suhaimi atau memintanya membayar untuk perbelanjaan perkahwinan tersebut. Hakim mahkamah sesyen yang memutuskan bahawa pihak pendakwaan telah membuktikan kesnya, mensabitkan dan menghukum perayu kepada enam bulan penjara dan denda sebanyak RM5,000. Perayu merayu terhadap sabitan dan hukuman menurut s 307 Kanun Prosedur Jenayah ('KPJ') dan satu permohonan untuk menggantung pelaksanaan hukuman telah diberikan sementara menunggu rayuan. Berikutan s 308 KPJ, Mahkamah Sesyen, Alor Star sebagai mahkamah dari mana rayuan dibuat, perlu memindahkan kepada Mahkamah Tinggi rekod rayuan yang mengandungi salinan setiap rekod prosiding, alasan penghakiman, notis rayuan dan petisyen rayuan. Walau bagaimanapun, tidak ada penghakiman bertulis di dalam rayuan ini kerana hakim mahkamah sesyen yang mendengar dan memberikan

keputusan di dalam kes ini telah ditahan kerja daripada melaksanakan tugasnya menurut Peraturan 44, Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993. Kemudian, seperti yang diarahkan oleh Ketua Hakim Negara ('KHN'), rekod rayuan disusun tanpa alasan penghakiman. Di dalam rayuannya, perayu menghujah bahawa sabitan dan hukuman harus diketepikan oleh mahkamah ini dalam pelaksanaan kuasa semakannya. Pihak pendakwaan, sebaliknya menghujah bahawa sabitan dan hukuman yang dikenakan tidak patut diganggu.

Diputuskan, menolak rayuan:

(1) Ketiadaan alasan penghakiman di dalam kes ini bermaksud tidak ada rayuan yang betul. Mahkamah Tinggi oleh itu boleh meneruskan untuk melaksanakan kuasa semakan dalam mempertimbangkan rayuan ini (lihat perenggan 16).

(2) Mengikut rekod rayuan, hakim perbicaraan jelas telah menilai dan mempertimbangkan kedua-dua keterangan oleh pihak pendakwaan dan pembelaan, dan memutuskan bahawa pihak pembelaan telah gagal untuk menunjukkan sebarang keraguan yang munasabah ke atas kes pihak pendakwaan dan juga gagal untuk mematahkan, atas imbangan kebarangkalian, anggapan di bawah s 42(3). Oleh sebab tidak ada kesilapan yang dilakukan oleh hakim mahkamah sesyen dari segi undang-undang dan fakta, kegagalan memberi alasan penghakiman di dalam kes ini tidak menghalang tugas mahkamah ini untuk menilai dan memeriksa keputusan hakim mahkamah sesyen. Oleh itu keputusan hakim mahkamah sesyen telah disahkan oleh mahkamah ini dalam pelaksanaan kuasa-kuasa semakannya di bawah s 325 KPJ (lihat perenggan 21 & 23).]

Notes

For cases on record of appeal, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1374–1432.

Cases referred to

Azman bin Jamhuri v PP [2000] MLJU 702; [2001] 1 CLJ 539, HC (folld)
DA Duncan v PP [1980] 2 MLJ 195, FC (refd)
Jaafar Abu & Anor v PP [1988] 1 CLJ (Rep) 142, SC (not folld)
PP v Rosman Abdul Wahab [2007] 2 MLJ 688; [2006] 4 CLJ 615, HC (refd)
Rodiah bt Sitam v PP [2009] 7 AMR 728 (folld)

Legislation referred to

Anti-Corruption Act 1997 (repealed) s 2, 42(3)
Courts of Judicature Act 1964 s 66(1)
Criminal Procedure Code ss 307, 308, 325
Penal Code ss 165, 185, 409

Prevention of Corruption Act 1961 (repealed) s 4(a)
Public Officers (Conduct and Dicipline) Regulations 1993 reg 44

G Ravishankar (R Shankar Gandhi & Associates) for the appellant.
Saiful Hazmi bin Mohd Saad (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission) for the respondent.

Zamani A Rahim JC:

[1] The appellant was a pensioner since 3 February 2005. His last post before retirement was as Pengarah Maktab Perguruan Pulau Pinang. Before that, he was Ketua Sektor Pengurusan dan Perkhidmatan, Jabatan Pendidikan Negeri Kedah. The appellant was charged at the Sessions Court Alor Star with an offence under s 165 of the Penal Code. The trial commenced on 12 January 2004 and concluded on 28 September 2006, a period stretched for almost three (3) years, wherein he was found guilty, convicted and sentenced to six (6) months imprisonment from the date of conviction and a fine of RM5,000 in default six (6) months imprisonment.

[2] Upon conviction, the appellant wasted no time, as on the same day he lodged an appeal pursuant to s 307 of the Criminal Procedure Code ('CPC') against conviction and sentence. An application for stay of execution of the sentence was granted pending appeal.

[3] The next course of action is for the court appealed from to serve the grounds of decision to the appellant or his advocate. Within ten (10) days after the service of the grounds of decision, the appellant shall lodge a petition of appeal addressed to the High Court. Having complied with the provisions of s 307 of the CPC, the court appealed from shall transmit to the High Court, pursuant to s 308 of the CPC, the record of appeal which consist a copy each of:

(a) the record of the proceedings;

(b) the grounds of decision;

(c) the notice of appeal; and

(d) the petition of appeal.

[4] On 21 January 2009 I have fixed case management for criminal cases, when I was informed by learned counsel that he had yet to receive the grounds of decision and the notes of proceedings. On my instruction, my senior assistant registrar had enquired from the Sessions Court Alor Star, the court appealed from, about the record of appeal. The Sessions Court Alor Star was in a quandary as the grounds of judgment was not prepared or

written by the learned trial judge, who heard and delivered the decision in this case. By a letter dated 27 November 2008 the current senior sessions judge, Alor Star sought the view of our Chief Justice of Malaya (CJM), who by his letter dated 11 December 2008, replied that the trial judge in question was interdicted from performing her duty in accordance with Peraturan 44, Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 and she was thus, legally incapacitated to write the grounds of judgment at the moment. The CJM had directed to proceed with the appeal and prepared the appeal record without the grounds of judgment. The CJM's letter dated 11 December 2008 is now reproduced hereunder.

11 Disember 2008

Puan Hajjah Maznah binti Abdul Aziz,

Hakim Kanan,

Mahkamah Sesyen Alor Star,

Jalan Suka Menanti,

05150 Alor Star,

Kedah Darul Aman.

Puan,

Mahkamah Sesyen Alor Star

Kes Tangkap No: 61-01-03

Rayuan Jenayah Mahkamah Tinggi No: 42-27-06

Munamad Zubir B Mustafa Iwn Pendakwa Raya

Adalah saya merujuk kepada perkara di atas dan juga surat puan bertarikh 27.11.2008.

2 Memandangkan Hakim Mahkamah Sesyen yang membuat keputusan iaitu Puan Zunaidah bt Mohd Idris telah *ditahan kerja* menurut Peraturan 44, Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993, maka beliau tidak berkelayakan untuk menulis alasan penghakiman tersebut buat masa ini.

3 Sehubungan dengan itu, *rayuan tersebut bolehlah diteruskan dan rekod rayuan hendaklah disediakan tanpa alasan penghakiman tersebut*.

Sekian, terima kasih.

Yang ikhlas,

t.t

(*DATO' ARIFIN BIN ZAKARIA*)

Hakim Besar Malaya

[5] Accordingly, the record of appeal was prepared and transmitted to the High Court. As directed, the record of appeal was compiled, of course without the grounds of decision. The CJM's aforesaid letter was incorporated at p 7 in the record of appeal to explain the absence of the grounds of appeal. As the notice of appeal was filed on 28 September 2006, almost three (3) years ago, I propose to dispose of this appeal as soon as possible. Delaying in disposing cases, be it criminal or civil, is a judicial disease that every now and then, bug the administration of justice. It demands immediate eradication. A negative public perception of judicial incompetence and inefficiency must be erased from the public mind. Bear in mind an often cited maxim — 'justice delayed is justice denied'. To expedite the matter, I had directed the appellant's and prosecution's counsel alike to assist the court to submit their respective submissions with relevant case laws on the subject of non-availability of the written grounds of decision during the appeal. Learned counsel for the appellant and the learned deputy had responded to my direction and both of them had since forwarded their respective submissions. Learned counsel urged me to set aside the conviction and sentence imposed on the appellant relying on decision of Ian HC Chin J in *Azman bin Jamhuri v Public Prosecutor* [2000] MLJU 702; [2001] 1 CLJ 539. On the other hand, the learned deputy requested me not to disturb the conviction and sentence based on the Supreme Court case of *Jaafar Abu & Anor v Public Prosecutor* [1988] 1 CLJ (Rep) 142. The facts in *Jaafar Abu & Anor* are these. The two applicants with another person were charged and convicted under s 4(a) of the Prevention of Corruption Act 1961 and were sentenced to three (3) months imprisonment and one (1) month imprisonment respectively. They appealed against sentence. There was no written judgment by the learned President of the sessions court as he had left the service. The High Court on appeal dismissed the appeal and affirmed the conviction and sentence.

[6] The applicant applied pursuant to s 66(1) of the Courts of Judicature Act 1964 for a determination of the following questions:

(a) When there is an appeal pending and no grounds of judgment available can the High Court act in the revision.

(b) If the answer yes, what is the proper order the judge should make.

[7] It would appear that the learned High Court judge treated the case on revision. Lee Hun Hoe CJ (*Borneo*) who delivered the Supreme Court judgment held as follows:

(a) There was no doubt that the High Court in hearing an appeal can proceed to exercise its power of revision and that the High Court judge in the instant case had complete jurisdiction to do as he did.

(b) That if the learned judge has complete jurisdiction then he is entitled to

make such orders as he deems fit in the circumstances. Sentences of the applicants to be carried out forthwith.

[8] The Supreme Court did not interfere with the High Court decision and confirmed the convictions and sentences. The applicants appeal was dismissed.

[9] In *Azman bin Jamhuri*'s case, the facts are these. The accused appealed against conviction and sentence by the sessions court judge on two charges of possession of cannabis. The appeal record, however, did not contain a copy of the grounds as required under s 308 of the CPC. The learned deputy urged the court to adjourn the instant appeal to enable the sessions judge to write his grounds of decision or alternatively, to deal with the matter on revision. Ian HC Chin J took the stand that the case was to proceed by way of revision. At p 545, His Lordship said:

> In my view, it does not really matter whether you act as if the case is under appeal or in revision; it calls for the same consideration which I will refer to later. I prefer to deal with the present case in revision since there are no grounds of decision and s 308 had not been complied with.

[10] Having evaluated both the prosecution case and defence case, Ian HC Chin J was of the view that the accused's conviction was not safe. In the exercise of His Lordship's revisionary powers, the conviction and sentence was set aside.

[11] In another recent case of *Rodiah bt Sitam v Public Prosecutor* [2009] 7 AMR 728 after a full trial, the appellant was found guilty on two charges — the first charge an offence of criminal breach of trust under s 409 of the Penal Code where she was sentenced to three (3) years imprisonment and the second charge an offence of giving false information to a public servant under s 185 of the Penal Code where she was sentenced to three (3) months imprisonment. The sentences were to run concurrently. Hence the appeal against convictions and sentences. At the close of the prosecution's case, the defence elected not to submit and the learned sessions court judge decided that as the accused did not submit no case to answer, he found — that the prosecution has made out a prima facie case against the accused.

[12] The appellant's defence was called. At the hearing of the appeal before the High Court, 13 years had lapsed and no grounds was written or made available. Linton Albert J who delivered the judgment observed at para 6 p 732 as follows:

The failure of accused person to submit a no case to answer at the close of the case for the prosecution whether or not represented by counsel, cannot short-circuit the fundamental requirement that at the end of the case for the prosecution the trial judge must judicially evaluate the evidence adduced before concluding that the prosecution has sufficiently established its case and calling upon the accused to enter upon his defence. The automatic finding of a case to answer by sheer default based on a purported admission is repugnant to the fundamental requirements of our criminal justice system. In *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 AMR 89; [2003] 2 MLJ 65, Gopal Sri Ram JCA, delivering the judgment of the Court of Appeal said at p 104 (AMR); p 81 (MLJ):

It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution's evidence to *maximum evaluation* and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totally of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

[13] At para 8 p 733, His Lordship confirmed that:

The failure of the learned sessions court judge to conduct a maximum evaluation of all the evidence adduced by the prosecution at the conclusion of its case was therefore a serious misdirection which had caused a miscarriage of justice.

[14] Following *Azman bin Jamhuri*, by way of revision, His Lordship reversed the appellant's convictions on the first and second charge and sentences set aside. The appellant was accordingly acquitted and discharged. No order of retrial was made as the case was very long outstanding due to inexcusable delay.

[15] To recap, in the case of *Jaafar Abu & Anor*, the appeal was against sentence where the High Court and similarly the Supreme Court made concurrent decisions to dismiss the appeal and affirmed the conviction and sentence. Whilst in *Azmah Jamhuri*, and *Rodiah bt Sitam*, in exercising the powers of revision, the convictions and sentences were set aside. All the three decided cases aforesaid had a common denominator in that, they were decided without the benefit of the grounds of decision.

[16] In this case, as there was no proper appeal before me in the absence of the grounds of decision contrary to s 308 of the CPC, and I propose to follow the case of *Azman bin Jamhuri* and *Rodiah bt Sitam*, to deal this appeal by way of revision under Chapter XXXI of the CPC.

[17] Having perused the appeal record, the notes of proceeding's showed that the prosecution closed its case on 23 February 2006, followed by

submissions of both the prosecution and defence. The case was adjourned to 13 March 2006 where the learned sessions court judge delivered her decision as follows:

Tarikh: 13.3.2006

TPR:Encik Abdul Ghani

Peg OKT:Encik Hizeri

Untuk Keputusan:Kes Pendakwaan

Setelah meniliti hujahan serta keterangan saksi Pendakwaan, Mahkamah berpuas hati bahawa pihak Pendakwaan telah berjaya membuktikan kes prima facie terhadap OKT ini.

a) OKT adalah seorang penjawat awam — OKT bertugas sebagai Ketua Sektor Pengurusan Perkhidmatan Pendidikan di Jabatan Pendidikan Negeri Kedah.

b) OKT pada 30.12.2000 telah menerima satu barang berharga bila mana Encik Mohamad Suhaimi bin Othman (SP1) telah membiayai kos makanan bagi majlis perkahwinan anak perempuan OKT.

c) OKT menerima barang berharga itu tanpa apa-apa balasan. Encik Mohamad Suhaimi bin Othman (SP1) telah menjelaskan kos makanan dalam dua bayaran iaitu pada 16.12.2000 sejumlah RM2,000.00 dan 25.12.2000 sejumlah RM2,500.00 kepada Pak Lah, caterer yang sediakan makanan bagi majlis perkahwinan anak perempuan OKT. Bayaran-bayaran tersebut telah tidak dibayar balik oleh OKT melainkan setelah siasatan kes ini dijalankan.

d) OKT mengetahui bahawa pemberi barang tersebut mempunyai hubungan atau kaitan dengan tugas rasmi OKT. Dalam kes ini, Encik Mohamad Suhaimi merupakan seorang kontraktor yang menjalankan kerja-kerja selenggara di sekolah-sekolah menengah bernilai RM20,000.00 ke bawah, di mana kerja-kerja tersebut berada dalam pengurusan Jabatan Pendidikan Negeri Kedah, dilaksanakan pada tahun 2000.

Ciri-ciri yang diperlukan bagi Perkhidmatan di bawah seksyen 165 Kanun Keseksaan telah berjaya dibuktikan.

Seksyen 42(3) Akta Pencegahan Rasuah 1997 ie anggapannya terpakai terhadap OKT.

Dengan ini OKT dipanggil untuk membela diri.

Tarikh sambung bicara:8 & 9 Mei 2006

Jaminan dilanjutkan.

tt (ZUNAIDAH BT MOHD IDRIS) 13/3/06

[18] It can be seen that it would be an unfair accusation that no grounds of decision was given by the learned sessions court judge. The contemporaneous record in the notes of proceeding at pp 168–169 of the appeal record showed that, upon maximum or a full evaluation of the evidence of the prosecution witnesses which necessarily include the credibilities of SP1, SP2 (wedding caterer) and the parties submissions, the learned sessions court judge was satisfied and had made a finding, at the close of the prosecution case that, all the essential ingredients of the offence under s 165 of the Penal Code (a prescribed offence under s 2 of the Anti-Corruption Act 1997) had been established. And therefore, the presumption under s 42(3) had been raised against the accused. See judgment of Low Hop Bing J (as he then was) in *Public Prosecutor v Rosman bin Abdul Wahab* [2007] 2 MLJ 688; [2006] 4 CLJ 615.

[19] In the circumstances of this case, the credibility of SP1, a key witness for the prosecution played a minimal part in determining a prima facie case by the trial judge in arriving at her conclusion at the close of the prosecution case. There were other overwhelming evidence against the accused, that is, the testimony of an independent witness, SP2, and documentary evidences P2A, P3A, P5A, P9A and P14. In consequent, a prima facie had been made out against the accused and his defence was rightly called.

[20] Having called the defence, the accused elected to give his evidence on oath. After his defence, the accused proposed to call one Abdullah bin Yunus, Ketua Sektor Kemanusiaan, Jabatan Pendidikan Negeri Kedah. The case was put to 27 July 2006 wherein the court was informed by learned counsel that no more witnesses would be called. That mean to say only the accused testified for the defence. The defence closed its case. On 28 September 2006, the learned sessions court judge delivered her decision as follows:

> Setelah meneliti keterangan saksi-saksi pendakwaan dan saksi pembelaan dan setelah mempertimbangkan hujahan pendakwaan dan peguambela OKT, mahkamah berpuas hati bahawa pihak pembelaan telah gagal membangkitkan apa-apa keraguan yang munasabah terhadap kes pendakwaan.
>
> Pihak pendakwaan telah berjaya membuktikan kes menjangkau apa-apa keraguan yang munasabah (beyond reasonable doubt) terhadap OKT sebagaimana terkandung dalam pertuduhan.
>
> Mahkamah mensabitkan OKT terhadap pertuduhan tersebut.
>
> tt (ZUNAIDAH BT MOHD IDRIS) 28/9/06

[21] The learned sessions court judge, at p 199 of the appeal record, had obviously evaluated and considered both the evidence tendered by the prosecution and the defence, and ruled that the defence had failed to cast any reasonable doubt on the prosecution's case and also failed to rebut on the

balance of probability the presumption under s 42(3). In his defence, the accused denied that he had official relation with SP1; denied that he awarded the contract to SP1; denied that he invited SP1 to his daughter's wedding reception on 30 December 2000; denied that he requested SP1 to pay for the wedding expenses and denied having said to SP1 'you bayar ini' (see appeal record at p 175–178). The accused defence was, therefore a bare denial (see *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195 (FC)). As a result, the prosecution had successfully proved its case beyond reasonable doubt. The accused was found guilty and convicted as charged.

[22] On mitigation and taking into account the following factors, inter alia, the accused was a public officer; the offence was committed while he was in service; the accused did make the repayment, though after the BPR action had commenced; the accused was a first offender and the public interest demanded that public officers must be clean and free from graft, the accused was sentenced to six (6) months imprisonment from the date of conviction and a fine of RM5,000, in default six (6) months imprisonment.

[23] In the light of the above, I do not detect any error made by the learned sessions court judge both in law and in facts. The non-delivery of grounds of judgment in this case has in no way impeded my task to evaluate and examine the decision made by the learned sessions court judge. In pursuant of my revisionary powers under s 325 of the CPC, I hereby affirm the decision of the court below. The accused appeal is accordingly dismissed.

Appeal dismissed.

Reported by Kohila Nesan